

81020-6

FILED
DEC 28 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. _____
Court of Appeals No. 34053-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK KILGORE,

Petitioner.

FILED
COURT OF APPEALS
DIVISION II
07 DEC 26 PM 1:19
STATE OF WASHINGTON
BY DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Vicki Hogan, Judge

PETITION FOR REVIEW

JAMES R. DIXON
Attorney for Petitioner

Dixon & Cannon
216 First Ave. S, Suite 202
Seattle, WA 98104
(206) 957-2247



ORIGINAL

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>IDENTITY OF PETITIONER</u> | 1 |
| B. <u>COURT OF APPEALS DECISION</u> | 1 |
| C. <u>ISSUES PRESENTED FOR REVIEW</u> | 2 |
| D. <u>STATEMENT OF FACTS</u> | 3 |
| E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u> | 7 |
| 1. Because the judgment and sentence was not final, petitioner had the right to demand that the court resentence him within the standard range. | 7 |
| 2. No matter what name is given to the Court's 2005 order, it failed to satisfy the constitutional requirements of <i>Blakely</i>. | 12 |
| 3. The Court of Appeals misapplied <i>Bararrious</i> when it dismissed petitioner's appeal. | 13 |
| F. <u>CONCLUSION</u> | 15 |

TABLE OF AUTHORITIES

| | Page |
|---|----------------------------|
| <u>WASHINGTON CASES</u> | |
| <i>In re St. Pierre</i> , 118 Wn.2d 321, 823 P.2d 492 (1992)..... | 11, 14-15 |
| <i>In re Skylandi</i> , 160 Wn.2d 944, 952 fn 5, 162 P.3d 413 (2007)..... | 10 |
| <i>State v. Barberio</i> , 121 Wn.2d 48, 846 P.2d 519 (1993)..... | 1, 6, 13-15 |
| <i>State v. Evans</i> , 154 Wn.2d 118, 110 P.3d 192 (2005)..... | 8, 11 |
| <i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005))..... | 3, 8 |
| <i>State v. Kilgore</i> , 107 Wn. App. 160, 177-82, 26 P.3d 308 (2001) | 2 |
| <i>State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002)..... | 3 |
| <i>State v. Nicholson</i> , 84 Wn. App. 75, 78-79, 925 P.2d 637 (1966) | 13 |
| to <i>State v. Pryor</i> , 115 Wn.2d 445, 799 P.2d 244 (1990)..... | 14 |
| <u>FEDERAL CASES</u> | |
| <u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct 2531, 195 L.Ed. 2d 403 (2004). | 3, 6, 7, 8, 11, 12, 13, 15 |

TABLE OF AUTHORITIES (CONT'D)

| | |
|--|---|
| <i>Burrell v. U.S.</i> , 467 F.3d 160, 169 (2 nd Cir. 2006), <i>cert denied</i> , 127 S.Ct. 2031 (2007).) | 9 |
|--|---|

Page

FEDERAL CASES (CONT'D)

| | |
|---|----|
| <i>Berman v. United States</i> , 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) | 10 |
|---|----|

| | |
|---|----|
| <i>Griffin v. Kentucky</i> , 479 U.S. 314, 327, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987) | 11 |
|---|----|

| | |
|---|----|
| <i>Richardson v. Gramley</i> , 998 F.2d 463, 465 (7 th Cir. 1993) | 10 |
|---|----|

| | |
|--|---|
| <i>U.S. v. Colvin</i> , 204 F.3d 1221 (9 th Cir. 2001) | 9 |
|--|---|

| | |
|---|----|
| <i>U.S. v. LaFromboise</i> 427 F.3d 680, 685 (9 th Cir. 2005) | 10 |
|---|----|

RULES, STATUTES AND OTHERS

| | |
|----------------------|--------|
| U.S. Const. amend. 6 | 7, 15 |
| RAP 2.5 | 14, 15 |
| RAP 13.4 | 7 |

A. IDENTITY OF PETITIONER

Petitioner, Mark Kilgore, asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS DECISION

In a published decision with three separate opinions, the Court of Appeals dismissed petitioner's appeal on November 27, 2007.

C. ISSUES PRESENTED FOR REVIEW

1. Two of petitioner's convictions were reversed during his first appeal, lowering his offender score and reducing the number of current offenses. In reversing those two convictions, the appellate court ordered the case remanded for further proceedings. Between the time of the mandate and the time of the "further proceedings", the Supreme Court issued its decision in *Washington v. Blakely*. On remand, however, the trial court held that *Blakely* did not apply because the convictions and sentences became final when the mandate issued. This petition presents the issue of whether a judgment becomes final when it is remanded for further proceedings that are not purely administrative in nature, or whether the judgment is final only after the "further proceedings" are held

2. Does this Court's decision in *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993), bar consideration of an appeal where there has been a change in the law, and the sentence re-imposed is now unconstitu-

tional under the federal constitution?

D. STATEMENT OF FACTS

Mark Kilgore is an honorably discharged veteran of the United States Navy. He is 45 years old, and before this case, had no prior involvement with the criminal justice system. CP 31.

In 1998, Mr. Kilgore was convicted of 4 counts of child molestation and 3 counts of child rape. He did not have any prior convictions, but because of the multiple offense policy, his offender score for each count was 18. SRP 1559-60.¹ A sentencing hearing was held on December 1, 1998, at which time the Honorable Vicki Hogan imposed an exceptional sentence of 560 months, twice the standard range. SRP 1583-84. The court relied upon three separate aggravating circumstances to justify the exceptional sentence—an abuse of trust, particular vulnerability, and a lack of remorse. SRP 1583-87

Mr. Kilgore challenged his convictions on appeal. The court of appeals concluded that the trial court had abused its discretion in excluding exculpatory evidence relating to C.M., one of the complaining witnesses. State v. Kilgore, 107 Wn. App. 160, 177-82, 26 P.3d 308 (2001). Accordingly, the court of appeals reversed one count of child rape and one

¹ SRP refers to the verbatim report from the sentencing hearing held on December 1, 1998, while “RP” refers to the hearing held on October 7, 2005.

count of child molestation. The court of appeals affirmed the other convictions, and then remanded for further proceedings. *Id.* at 190.

This Court accepted review to resolve an ER 404(b) issue as to the remaining convictions. The State did not cross appeal the reversal of the two convictions. This Court ultimately concluded that there was no error in the admission of ER 404(b) evidence and affirmed the remaining five convictions in an opinion dated September 12, 2002. State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).

The case was remanded to the superior court in a Mandate issued on October 9, 2002. CP 8-21. Unfortunately, despite the fact that Mr. Kilgore now had a lower offender score and fewer convictions, and despite the remand for “further proceedings”, the court failed to bring him back for a new sentencing hearing. The only hearing that occurred was a hearing to impose additional financial obligations on the defendant, which was held on February 7, 2003. CP 26-27.

With the State neglecting to bring Mr. Kilgore back to court for a new sentencing hearing, Mr. Kilgore retained counsel and brought a motion for a sentencing hearing.² Through counsel, Mr. Kilgore filed a brief

² Mr. Kilgore was present for the first scheduled hearing in September of 2005, but that hearing was continued because of the court’s calendar. Mr. Kilgore was sent back to prison. Through counsel he then waived his presence at the second hearing because of health issues that had arisen during his first trip back to Pierce County. RP 4-5; CP 30, 97.

on July 15, 2005 asking the court to impose a standard range sentence pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct 2531, 195 L.Ed2d 403 (2004) and *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). CP 31 - 49.

The court refused to do so, finding that Mr. Kilgore was not entitled to a sentencing hearing, and that the court would simply "correct" the judgment and sentence:

The Defendant's case was final in October or November of 2002. I am not re-sentencing the Defendant based upon the decisions of the higher court. Rather, I am correcting the Judgment and Sentence, and that's what we need to accomplish.

RP 13. The court entered a written order, which stated in relevant part:

1. This case was final October 2, 2002;
2. Defendant is entitled to an order correcting Judgment and Sentence, striking Counts I and II and correcting the offender score from 18 to 12 on the remaining five counts;
3. The defendant is not entitled to a new sentencing hearing;
4. All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein.

CP 101-02.

In addition to the order, the court also signed a 3-page Motion and Order Correcting Judgment and Sentence, which set forth numerous

changes to the offender score and number of current offenses based on the reduced offender score. CP 102-04. The order specifically incorporated by reference the terms of the earlier sentencing: “5) All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein.” CP 104.

Mr. Kilgore appealed. Following oral argument before a panel at Division II, the court of appeals dismissed the appeal. There were three separate opinions: a majority decision (signed by one judge), a dissent, and a concurrence in the result. Although there appeared to be little agreement, all three judges agreed that the mandate gave the court discretion to impose a different sentence on the remaining convictions.

Much of the difference between the majority opinion and dissent focused on whether the judgment was final at the time of the 2005 hearing. The dissent examined the difference between a remand for ministerial purposes, involving no discretion on the part of the trial court, and remands where the trial court is permitted to exercise its discretion. Relying upon federal and state case law, the dissent explained that a judgment is not final if the appellate court has remanded the case for further proceedings, unless the remand is for purely “ministerial purposes.” Dissent at 19-21. Because the remand in this case was open-ended, allowing the trial

court to exercise its discretion, *Blakely* applied and the sentence was unlawful.

The “majority” opinion stated that the open-ended mandate became a “ministerial” mandate once the trial court elected not to reconsider its decision. Slip Op. at 9. Accordingly, the finality date for the judgment and sentence was 2002, when the mandate issued.³ The majority further reasoned that because the trial court elected not to re-sentence Mr. Kilgore, then the appeal should be dismissed pursuant to *State v. Barberio*.

In a short concurrence, Judge Penoyar stated that he concurred in the result (presumably this meant the dismissal of the action). The concurrence reasoned that the trial court had the opportunity to revisit the sentences in 2005, but elected not to do so. Slip Op. at 24. If the court would have revisited the sentences, *Blakely* would have applied. But because the court did not, then the 1998 sentences remained in effect. *Id.* The concurring judge did not state whether he believed the judgment to have been final. The only case he cited to was *Blakely*.

³ The dissent had harsh criticism for this imaginative argument: “The characterization of our remand order depends on our language in the context of our decision, not on what the trial court does in response to our language, particularly where, as here, the trial court attempted to foreclose Kilgore’s Blakely rights with a nunc pro tunc order entered after Blakely purporting to rule that Kilgore’s case was final before *Blakely*.” Dissent at 21.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The question of when a judgment becomes final is an issue that directly impacts a defendant's Sixth Amendment right to a jury trial. As of 2004, an exceptional sentence imposed without the requisite jury findings is an unlawful sentence under the federal constitution. A key issue is whether the judgment was final when the mandate issued, or whether it only became final after the "further proceedings" were held. If the judgment was not final when the mandate was issued, then Kilgore had a right to challenge his sentence as unconstitutional at the "further proceedings." Review is appropriate under RAP 13.4(b)(3). 7

As to the *Barberio* part of the decision, this is an issue that cries out for clarification from this Court. The *Kilgore* opinion suggests that this rule applies even when there has been a substantive change in the law. This is contrary to this Court's holding in *Barberio*, making review appropriate under RAP 13.4(b)(1). Moreover, to the extent that *Barberio* is relied upon to deny a defendant the right to challenge a constitutionally infirm sentence, then review is appropriate under RAP 13.4(b)(3).

1. **Because the judgment and sentence was not final, petitioner had the right to demand that the court resentence him within the standard range.**

As this Court is aware, *Blakely v. Washington*⁴ and *State v.*

⁴ 542 U.S. 296, 124 S.Ct 2531, 195 L.Ed.2d 403 (2004).

Hughes,⁵ prohibit the court from imposing an exceptional sentence in the absence of jury findings as to the aggravating factors. To do otherwise, would violate the Sixth Amendment of the United States Constitution. While there are limited exceptions to this prohibition, none of those exceptions apply here.

In *State v. Evans*, this Court stemmed the potential flood of retroactive attacks on prior sentences by holding that “*Blakely* and *Apprendi* do not apply generally on collateral review.” 154 Wn.2d 438, 637, 114 P.3d 627 (2005). Under *Evans*, a trial court is required to follow the mandates of *Blakely* when imposing a sentence, but the courts need not go back and correct every sentence of every inmate who received an exceptional sentence. Thus, the court need not correct a sentence if it comes to the court by means of a collateral review.

In the current case the majority opinion and dissent opinion both agreed that if the judgment was not final, then *Blakely* applied. All three opinions also recognized that if a sentencing would have occurred in 2005, then *Blakely* would have applied. The main question for the appellate court became whether the judgment was final despite the open-ended mandate in 2002 that remanded the case for further proceedings.

⁵ 154 Wn.2d 118, 110 P.3d 192 (2005).

All three judges recognized that *Blakely* required a new sentence if the conviction was not final. As ably described by Judge Armstrong in his dissent, there is limited Washington case law on the issue, but there are a number of federal cases that have addressed this issue. Two slightly different tests have evolved for determining when a case is final following remand. And regardless of which test is applied, the conviction was not final if the court had discretion to impose a different sentence. Dissent at 17-20.

The test employed by the Second Circuit holds that a conviction is not final for purposes of retroactive application of a change in the law if the case was remanded for further proceedings of a non-ministerial nature. *Burrell v. U.S.*, 467 F.3d 160, 169 (2nd Cir. 2006), *cert denied*, 127 S.Ct. 2031 (2007). In other words, if the remand allowed the court to exercise “discretion, skill or judgment”, then the judgment and sentence was not yet final. *Id.* at 164. The Ninth Circuit employs an even less strict standard, holding that a judgment is not final when the mandate issues if the case has been remanded for *any* further proceedings. *U.S. v. Colvin*, 204 F.3d 1221 (9th Cir. 2001). Specifically, the Ninth Circuit concluded that if the appellate court reverses any portion of a conviction or sentence and remands back to the trial court for further proceedings, the judgment is not final until the district court has acted on remand and the time has passed for appealing that action. *Id.* at 1225-26. (“His judgment of conviction did not become final

until the time for appealing the amended judgment had passed.”); *U.S. v. LaFromboise*, 427 F.3d 680, 685 (9th Cir. 2005) (same).

As pointed out by Judge Armstrong’s dissent, under either test, the judgment was not final. While these two approaches to the issue are not necessarily binding at the State level, their reasoning is consistent with language and reasoning in this Court’s decision in *In re Skylandi*, 160 Wn.2d 944, 952 fn 5, 162 P.3d 413 (2007) (“a judgment is not final if the appellate court has remanded the case to the lower court for further proceedings, unless the remand is for a purely “ministerial” purpose, involving no discretion, such as recomposing prejudgment interest according to a set formula.”), quoting *Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993).

In the present case, the majority and concurrence acknowledged that the trial court had discretion to impose a different sentence on the remaining convictions. Given that the trial court had discretion to change the sentences, the sentences cannot be considered final. Final means that the sentence cannot be changed. *In re Skylandi*, 160 Wn.2d at 952 *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) (“Final judgment in a criminal case means sentence. The sentence is the judgment.”). Because the mandate required further proceedings, the judgment was not final, and Kilgore was entitled to insist that the court

sentence him within the standard range.⁶

Although not entirely clear, the majority decision also appears to hold that because petitioner had not previously challenged his exceptional sentence prior to the mandate, his judgment and sentence was final as to that issue and that he could not benefit from the change in the law occurring in 2004. That is incorrect. In fact, this Court in *In re St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992) specifically rejected the notion that an issue could become final for the purposes of retroactivity analysis before the case as a whole became final. *Id.* at 327, citing to *Griffin v. Kentucky*, 479 U.S. 314, 327, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987). The *St. Pierre* court reiterated that new criminal rules apply retroactively “to all cases, state or federal, pending on direct review *or not yet final*.” *Id.* at 326 (emphasis added).

As the dissent in our case explained, “there was no need for the defendant to have somehow “triggered” *Blakely* relief by complaining of his exceptional sentences beforehand. The only requirement is that his case was not final as of June 24, 2004.” Dissent at 15. Because Mark Kilgore’s case

⁶ Significantly, the State recognized that it could not prevail if the trial court had discretion on remand, and so instead argued that the trial court is powerless to change the sentence once the mandate is issued. See Brief of Resp. at 9 (“When the State declined to retry defendant on the two reversed counts, the trial court lost its jurisdiction to resentence the defendant on the five affirmed convictions.”) and at 10 (“When the State declined to retry the offenses, the trial court only had the power to remove the vacated convictions from the judgment and sentence.”) There is simply no support for this position, as recognized by even the majority opinion in this case.

could not be final until the further proceedings were held, the trial court was required to comply with *Blakely*.

2. **No matter what name is given to the Court's 2005 order, it failed to satisfy the constitutional requirements of *Blakely*.**

As set forth in petitioner's opening brief at the court of appeals level, given the change in offender score, the trial court was obligated to re-sentence petitioner based on his changed status following a partially successful appeal. But even if there was merit to the State's position that the defendant was only entitled to a "correcting" of the judgment and sentence, that "correction" still had to be a lawful one. And under *Blakely*, an order that expressly incorporates an exceptional sentence that was entered without the requisite jury findings is not a lawful sentence.

Contrary to the apparent reasoning of the court of appeals, *State v. Evans* did not relieve the court of its obligation to enter lawful orders. *Evans* placed limitations on the means by which a previously entered sentence could be challenged. Specifically, it excluded challenges which could only be brought through a collateral attack. See *Evans*, at 442, "We conclude that neither *Apprendi* nor *Blakely* apply retroactively on *collateral review* to convictions that were final when *Blakely* was announced." (emphasis added)); *Evans* at 457 ("We hold that *Blakely* and *Apprendi* do not apply generally on *collateral review*." (emphasis added)).

Evans has no application because it relates to challenges to past orders, whereas the primary issue here is the current 2005 order entered by the trial court refusing to re-sentence Mr. Kilgore consistent with *Blakely*. When the court amended or corrected the judgment and sentence, it was required to do so in a constitutional manner. It did not. Rather, it specifically incorporated the prior sentence, “as if set forth in full herein.” Thus, this is not a retroactive challenge to the prior sentence; it is a challenge to an unconstitutional order entered on October 27, 2005, after *Blakely* was decided. *Evans* did not relieve the trial court of its duty to act lawfully when modifying a sentence.⁷

3. The Court of Appeals misapplied *Barberio* when it dismissed petitioner’s appeal.

After concluding that the judgment was final in 2002, the majority decision dismissed petitioner’s appeal based on *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993). In *Barberio*, the defendant appealed his convictions but not his exceptional sentences. After the court of appeals reversed one of the convictions, the trial court re-imposed the same sentence on remand. The defendant then appealed his exceptional sentence.

⁷ In his dissent, Judge Armstrong explained why the trial court’s attempt to refer to one of the 2005 orders as a nunc pro tunc dating back to 2002 was meritless: “The purpose of a nunc pro tunc order is to record some prior act of the court that was actually performed but not then entered into the record.” *State v. Nicholson*, 84 Wn. App. 75, 78-79, 925 P.2d 637 (1996). Dissent at 13.

This Court concluded that because the issue was not raised the first time, it could not be raised on the second appeal. This was consistent with RAP 2.5, and the need for judicial economy. *Barberio* at 52.

But *Barberio* has no application here as that case did not involve a significant change in the law since the time of the first appeal. As such, that case does not support the Court of Appeals belief that the court can freely re-impose what has since become an unconstitutional sentence. To the contrary, the *Barberio* Court observed that the trial court did not rely upon an improper grounds for the sentence, but rather, “correctly eliminated defendant’s future dangerousness as an aggravating factor.” *Barberio*, 121 Wn.2d at 51 (citing to *State v. Pryor*, 115 Wn.2d 445, 799 P.2d 244 (1990)). By contrast, in the present case, the court did not eliminate that part of the judgment and sentence that the United States Supreme Court had subsequently found to be unconstitutional. Rather, the court re-imposed that sentence, despite the defense warning that doing so would violate *Blakely*. See CP 39-41, 85-89.

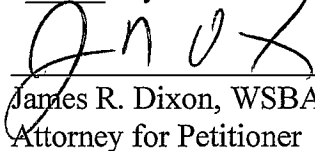
The court of appeal’s reading of *Barberio* is not only incorrect and unconstitutional, it is simply bad policy as well. Judicial efficiency is not promoted by making appellants raise meritless arguments in order to cover the possibility that the law will change between the appeal and time of a future re-sentencing hearing. As stated by this Court in *St. Pierre*, “A

contrary approach would engage parties to maintain seemingly frivolous claims on appeal in the hope another decision may announce a new rule. Such an approach would result in an inefficient use of judicial resources and distract parties from issues of consequence.” 118 Wn.2d. at 327. Additionally, a rule allowing the trial court to re-impose what is now known by all to be an unlawful and unconstitutional sentence creates contempt for the law. This Court should accept review of this case to clarify the operation of RAP 2.5 and *Barberio*.

F. CONCLUSION

The 2005 orders by the trial court did not comply with the constitutional requirements of *Blakely v. Washington*. For the reasons set forth above, petitioner asks this Court to accept review of his case and remand for a new sentencing hearing consistent with the dictates of the Sixth Amendment.

Respectfully submitted on this 24th day of December, 2007


James R. Dixon, WSBA #18014
Attorney for Petitioner

Certificate of Service ✓

The undersigned certifies that on this day he caused to be delivered by ABC-Legal Messenger to the attorney of record a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed in Seattle, WA on the date listed below.

12/24/07
Date

[Signature]
Signature

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARK PATRICK KILGORE,

Appellant.

No. 34053-4-II

PUBLISHED OPINION

Hunt, J. — Mark P. Kilgore appeals his exceptional 1998 sentences for multiple convictions of child rape and child molestation, which convictions we affirmed in a previous appeal. He argues that (1) when we remanded his case “for further proceedings” following his first appeal, the trial court should have resentenced him and erred in failing to apply *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 195 L. Ed. 2d 403 (2004); and (2) the trial court erred on remand when it simply corrected his offender score, ordered his two reversed convictions deleted from his 1998 judgment and sentence, and did not exercise independent judgment to revisit his exceptional sentences for the five affirmed convictions, thus, leaving intact his original 1998 exceptional sentences for those five affirmed convictions.

Citing *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993), the State moves to dismiss Kilgore’s appeal because (1) he failed to challenge his exceptional sentences in his first appeal; (2) there was no resentence on remand from which to appeal; and (3) he has previously appealed and we have previously affirmed his remaining five affirmed convictions, which he cannot now appeal a second time. Holding that *Barberio* controls, we grant the State’s motion to dismiss Kilgore’s

appeal.

FACTS

In 1998, a jury convicted Kilgore of four counts of first degree child molestation and three counts of first degree child rape involving three different victims. The trial court found that the following five aggravating factors justified exceptional sentences on each of the seven counts: (1) Kilgore violated a position of trust; (2) the victims were particularly vulnerable; (3) the convictions involved multiple victims and multiple incidents per victim; (4) Kilgore's conduct manifested deliberate cruelty; and (5) Kilgore showed no remorse. Kilgore's offender score was 18; his standard ranges were 149-198 months for the molestation counts and 210-280 months for the rape counts. On December 1, 1998, the trial court imposed concurrent exceptional sentences of 560 months on each count.

I. First Appeal and Remand

Kilgore appealed his seven convictions but not his seven corresponding exceptional sentences. Holding that the trial court erred in suppressing evidence that someone else had previously abused one of Kilgore's victims, we reversed counts I and II (rape and molestation of CM) and remanded "for further proceedings"; we affirmed the remaining five convictions. *State v. Kilgore*, 107 Wn. App. 160, 178, 190, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288 (2002). The Washington Supreme Court accepted review on a single ER 404(b) issue. The Court affirmed our decision. *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002). On October 7, 2002, the Court filed its mandate and remanded the case to the superior court.

The State did not retry Kilgore on the two reversed counts. Instead, it simply asked the

superior court to add appellate costs to the judgment and sentence.¹ On February 7, 2003, the trial court ordered Kilgore to pay appellate costs, the sole focus of the remand hearing.

II. *Blakely* Decision and Request for Resentencing Hearing

More than a year later, on June 24, 2004, the United States Supreme Court issued *Blakely*, holding, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely*, 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The *Blakely* Court further held that the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but rather the maximum a judge may impose without any additional findings. *Blakely*, 542 U.S. at 303-04.

The following year, our state Supreme Court held that *Blakely* does not apply retroactively to cases that were final when *Blakely* was announced. *State v. Evans*, 154 Wn.2d 438, 448, 114 P.3d 627, *cert. denied*, 546 U.S. 983 (2005).

At the request of Kilgore’s attorney, the trial court scheduled a so-called “resentencing” hearing for October 2005. Kilgore filed a memorandum arguing that he was entitled to receive a standard range sentence under *Blakely*. The State countered that (1) on remand following Kilgore’s direct appeal of his convictions, neither we nor the state Supreme Court had ordered the trial court to resentence Kilgore; (2) elimination of Kilgore’s two reversed convictions reduced his

¹ The record does not show whether Kilgore was present when the trial court considered this request. But the State did not ask the superior court to strike the two reversed counts, and the record shows no alteration of the 1998 judgment and sentence.

offender score from 18 to only 12 and, thus, did not change his standard sentencing range; (3) therefore, on remand, the trial court needed only to strike the two reversed counts from Kilgore's judgment and sentence and to correct his offender score; and (4) *Blakely* did not apply to Kilgore's remaining five exceptional sentences because they were final before *Blakely* was decided.

Following a hearing on October 7, 2005, which Kilgore did not attend,² the trial court agreed with the State. The trial court ruled that (1) because it was hearing a legal argument, rather than conducting a resentencing, Kilgore could waive his right to be present; and (2) "[t]he Defendant's case was final in October or November of 2002. I am not re-sentencing the Defendant based upon the decisions of the higher court. Rather, I am correcting the Judgment and Sentence, and that's what we need to accomplish." Report of Proceeding (Oct. 7, 2005) at 13.

On October 27, 2005, the trial court issued two orders. The first order, purporting to have been entered *nunc pro tunc* to November 1, 2002, stated that Kilgore's case was final when the Supreme Court issued its mandate in October 2002, that Kilgore was entitled to an order correcting his judgment and sentence by striking the two reversed counts and reducing his offender score on the remaining counts, and that he was not entitled to a new sentencing hearing. The second order corrected the 1998 judgment and sentence by striking references to reversed counts I and II and by reducing Kilgore's offender score from 18 to 12. The trial court left intact

² Kilgore waived his right to be present for the trial court's determination of whether he had a right to resentencing.

its 1998 judgment and exceptional sentences on the five affirmed counts.³

III. Second Appeal, After Remand

Kilgore appealed the trial court's ruling that he was not entitled to resentencing on remand. The State moved to dismiss Kilgore's appeal for failure to raise an appealable issue. Our court commissioner denied the State's motion to dismiss without prejudice.

The State reasserts its motion to dismiss, which we now grant.

ANALYSIS

I. No Resentencing for Affirmed Convictions on Remand

Although we ultimately dismiss Kilgore's appeal as untimely and improperly before us, we nevertheless first address his contention that the trial court erred in failing to exercise its discretion to resentence him on remand from his first appeal, in which he did not challenge his exceptional sentences. If Kilgore is correct that the trial court should have resentedenced him for his affirmed convictions when it considered our remand in 2005, then the remedy would be for us to remand again, this time for resentencing, rather than to dismiss his appeal.

³ The dissent disputes that the 2005 orders maintained the 2002-mandated finality of Kilgore's 1998 judgment and sentence for the five affirmed counts. As we explain in our analysis above, we respectfully disagree. Moreover, assuming, without deciding, that the dissent correctly notes the 2005 nunc pro tunc order was invalid, we fail to see how this point affects our majority rationale.

Accordingly, we adhere to our position that the 1998 judgment and sentence, which became final when mandated in 2002, remained intact, valid, and effective for sentencing purposes on the affirmed counts, which sentences were not affected in anyway when the trial court chose not to resentence for those affirmed counts during the 2005 remand.

Kilgore contends that (1) because our previous reversal of two of his convictions resulted in two fewer current offenses and, consequently, a reduced offender score, he was entitled to resentencing for his affirmed counts on remand;⁴ and (2) therefore, the trial court erred in failing to resentence him on the five affirmed counts. We disagree.

In each of the cases Kilgore cites, recalculation of an erroneous offender score on remand changed the defendant's standard sentencing range.⁵ But such is not the case here: Elimination of the two reversed convictions left Kilgore with an offender score of 12, still greater than 9, and, consequently, the same standard sentencing range as before his offender score recalculation.

We agree with the State that *a reduced standard range*, not a reduced offender score,⁶

⁴ Kilgore maintains that the incorrect offender score alone required the trial court to resentence him, citing *State v. Jackson*, 129 Wn. App. 95, 109 n.14, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); and *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

⁵ See *Roche*, 75 Wn. App. at 505 (without questionable prior conviction, score would be four instead of five). In *Jackson*, the court stated that ordinarily the imposition of an exceptional sentence requires a correct determination of the standard range, and remand is necessary when the offender score has been miscalculated unless the record makes clear that the trial court would impose the same sentence. 129 Wn. App. at 109. After citing the passage from *Roche*, the Supreme Court added in *Parker* that, because the sentencing court must correctly calculate the standard range before imposing an exceptional sentence, failure to do so is legal error subject to review. 132 Wn.2d at 189. "We are hesitant to affirm an exceptional sentence where the standard range has been incorrectly calculated because of the great likelihood that the judge relied, at least in part, on the incorrect standard ranges in his calculus." *Parker*, 132 Wn.2d at 190 (cited in *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999)).

⁶ Kilgore cites no authority to support his related argument that the trial court was obligated to resentence him on remand because our reduction of his total convictions from seven to five would likely have had an impact. Thus, we do not further consider this argument. See RAP 10.4(a)(5).

Moreover, Kilgore acknowledges that the trial court did not cite the multiple-offense policy as an aggravating factor to support his exceptional sentences. And the trial court specifically said it was basing its exceptional sentences on Kilgore's lack of remorse, a factor that does not reflect a likelihood that the sentencing court would have changed its sentence on remand based on five, instead of the original seven, counts. In contrast, see *State v. Stewart*, 125 Wn.2d

requires resentencing on remand. See *State v. Argo*, 81 Wn. App. 552, 915 P.2d 1103 (1996), in which Division One of our court held that remand for resentencing was unnecessary because his standard range remained the same, even though the defendant's offender score was reduced from 16 to 13. *Argo*, 81 Wn. App. at 569. See also *State v. Fleming*, 140 Wn. App. 132, 138, ___ P.3d ___ (2007) ("A trial court may determine that nine convictions exist and then stop calculating, so long as the court is not considering the imposition of an exceptional sentence based on reasons related to the offender score,"⁷ citing *State v. Lillard*, 122 Wn. App. 422, 433, 93 P.3d 969 (2004)). Kilgore, however, has not demonstrated a reduced standard range warranting resentencing.

Nevertheless, Kilgore attempts to appeal the trial court's failure to resentence him on remand, even though (1) his reduced offender score remained greater than nine; (2) he fails to show how a recalculated offender score greater than nine would have changed his sentence, especially in light of the fact that his standard sentencing ranges for his affirmed convictions remained the same; (3) he does not challenge the length of his exceptional sentences; and (4) he never challenged any of the exceptional sentence aggravating factors or their applicability, either in his first appeal or on remand. Rather, he argues that on remand, he was entitled to have the trial court resentence him to a standard range sentence under *Blakely*.⁸

893, 897, 890 P.2d 457 (1995) (multiple offense policy can be cited as aggravating factor when defendant has committed several crimes and his high offender score does not result in any greater penalty than if he had committed only one).

⁷ The trial court based Kilgore's sentence on the aggravating factors of (1) violation of a position of trust; (2) the vulnerability of his victims; and (3) Kilgore's lack of remorse.

⁸ Because Kilgore's case was tried before *Blakely* and before the Sentencing Reform Act amendments, he further asserts that *Blakely* would have required the trial court to impose

We agree with the dissent that for *Blakely* to apply, “The only requirement is that his case was not final as of June 24, 2004.” Dissent at page 15. But we respectfully disagree with the dissent’s assertion, based on intermediate federal court caselaw, that Kilgore’s 1998 judgment and sentence was not final until 2005. Instead, we hold that Kilgore’s 1998 judgment and sentence became final when our Supreme Court issued its mandate from his direct appeal in 2002, well before the United States Supreme Court’s 2004 issuance of *Blakely*.

standard range sentences if it had resentenced him on remand in 2005. We agree that Kilgore would have been entitled to standard range sentences if he had been resentenced at the 2005 remand hearing. See *State v. Pillatos*, 159 Wn.2d 459, 480, 150 P.3d 1130 (2007). But this is not what happened. Kilgore was not resentenced for his five affirmed convictions on remand in 2005 and, therefore, *Blakely* did not apply.

Moreover, if we were to remand Kilgore for resentencing on his affirmed convictions now, as the dissent suggests, *Blakely* would apply; but RCW 9.94A.537 (the Legislature’s “*Pillatos* fix”) would also apply. To comply with *Blakely*, RCW 9.94A.537(2) authorizes the trial court to convene a special jury to make factual findings necessary to support an exceptional sentence “as follows:

In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

But we are *not* remanding for resentencing on Kilgore’s previously affirmed convictions. Thus, RCW 9.94A.537(2) will not come into play here.

We further note, however, that even if Kilgore were to use this appeal, or a personal restraint petition, to reopen his 1998 exceptional sentences on his previously affirmed convictions, he would have to show either some flaw in the predicate facts underlying his original exceptional sentences or that the previous appellate decisions questioned the validity of his original exceptional sentences for these five affirmed convictions. But Kilgore argues neither, and the previous appellate and Supreme court decisions evince none. Absent argument and showing that the predicates for Kilgore’s 1998 exceptional sentences (the aggravating factors and their applicability) were erroneous, he cannot now establish that the trial court was required to resentence him on remand in 2005. And because the trial court neither was required to resentence him for his affirmed convictions on remand in 2005 nor undertook to resentence him, *Blakely* did not come into play. Thus, contrary to the dissent’s assertion, there was no sentencing error on remand in 2005 for us now to correct.

We agree with the dissent that our remand was “open-ended” when we “remanded for further proceedings.” Thus, in theory, the trial court could have considered resentencing Kilgore for the affirmed convictions on remand,⁹ and then, arguably, as Kilgore and the dissent assert, *Blakely* may very well have applied. But that is not what happened here.¹⁰

On the contrary, our remand did not require the trial court to resentence Kilgore for his affirmed convictions, the trial court did not choose to exercise its discretion to resentence,¹¹ and it did not err in so exercising its discretion. Thus, we respectfully disagree with the dissent’s assertion that Kilgore’s sentence was not final until after the 2005 remand. Dissent at 19-20. We hold instead that the trial court’s discretionary response to our remand resulted in the October 7, 2005 hearing functioning as a correction of the 1998 judgment and sentence for the two reversed convictions but not a re-sentencing for the five affirmed convictions.

We conclude, therefore, that the trial court neither abused its discretion nor erred in denying Kilgore’s request to resentence him under *Blakely*. Accordingly, Kilgore’s attempt to appeal the trial court’s refusal to resentence him on remand fails.

⁹ See *Barberio*, 121 Wn.2d at 51 (citing RAP 2.5(c)(1)).

¹⁰ The dissent further asserts we erroneously suggest that “a party may take advantage of a new rule of criminal procedure only if the party has raised an argument related to that rule in an earlier proceeding.” Dissent at 14. The dissent misapprehends our explanation. On the contrary, we mean simply that we did not remand expressly for resentencing; rather, we remanded more generally for “further proceedings.” This general remand language allowed the trial court to do what it did here -- it removed the reversed convictions from the 1998 judgment and sentence but chose not to exercise its discretion to resentence Kilgore for the affirmed convictions. Thus, there was no resentencing on remand to which *Blakely* might have applied.

¹¹ We do not further address the State’s contention that when, on remand, it declined to retry Kilgore on the two reversed convictions, the trial court lost jurisdiction to resentence him.

II. Motion To Dismiss Appeal

We next address the State's motion to dismiss, which challenges whether Kilgore's appeal is properly before us. Relying on *Barberio*, 121 Wn.2d 48, the State argues that our court commissioner should have dismissed Kilgore's appeal (his second) because (1) he could have challenged his exceptional sentences in his first appeal, but did not; and (2) the trial court did not resentence Kilgore on remand, but rather left his original exceptional sentences intact for the convictions affirmed in the first appeal. We agree with the State that *Barberio* requires dismissal of Kilgore's appeal.

Barberio was convicted of second and third degree rape and given exceptional sentences. Similar to Kilgore, Barberio initially appealed only his convictions, not his exceptional sentences. Division One of our court reversed his third degree rape conviction and affirmed his second degree rape conviction. *Barberio*, 121 Wn.2d at 49. Similar to Kilgore's case, on remand, the State elected not to retry Barberio for the reversed, third degree rape.

At resentencing, Barberio challenged the aggravating factors the trial court had found at his original sentencing. He contended that his reduced offender score and standard range, resulting from reversal of one count, entitled him to a reduction in his exceptional sentences on his affirmed count. *Barberio*, 121 Wn.2d at 49-50. The trial court imposed the same sentences it had originally imposed. And Barberio again appealed.

The State moved to dismiss Barberio's second appeal because he had failed to challenge his exceptional sentences in his first appeal. Division One of our court ruled:

We grant the State's motion [to dismiss] as to those issues which could have been raised in the first appeal, and deny the motion as to those issues which could not have been raised at that time. We affirm the exceptional sentence imposed at the

resentencing hearing.

State v. Barberio, 66 Wn. App. 902, 903, 833 P.2d 459 (1992).¹²

The Supreme Court granted limited review to clarify the rationale supporting Division One's partial dismissal of Barberio's appeal. *Barberio*, 121 Wn.2d at 50. The Court noted that on remand, the trial court had discretion to revisit an issue the defendant did not raise in the initial appeal, and if it did, the appellate court could also review the issue. *Barberio*, 121 Wn.2d at 51 (citing RAP 2.5(c)(1)). Reviewing the trial court's rulings on remand, however, the Court concluded that the trial court had not exercised its discretion to consider on remand issues that Barberio could have, but did not, raise in his first appeal. *See Barberio*, 121 Wn.2d at 51; *Barberio*, 66 Wn. App. at 906. Thus, the Court held that Barberio could not challenge his exceptional sentences in his second appeal.

The procedural posture of Kilgore's successive appeals is analogous to that in *Barberio*. Like Barberio, Kilgore did not challenge his exceptional sentences in his first appeal, and the trial court did not exercise its discretion to reconsider Kilgore's exceptional sentences on remand. Therefore, Kilgore cannot now challenge his original 1998 exceptional sentences in his second appeal, following remand from his first appeal; this remand did not require resentencing and instead, left intact Kilgore's original, unchallenged 1998 exceptional sentences on his five affirmed convictions.

The dissent maintains that (1) the *Barberio* Court dismissed only old issues that Barberio

¹² Division One reviewed (1) whether the trial court should have reduced Barberio's exceptional sentence in proportion to his reduced offender score and standard range, and (2) whether substantial evidence supported the trial court's "especially predatory" finding underlying Barberio's exceptional sentence. *See Barberio*, 66 Wn. App. at 905.

could have raised in his first appeal, whereas *Blakely* presented a new issue that Kilgore could not have raised in his first appeal; and (2) *Blakely* should apply here because “Kilgore’s case did not become final when the mandate was filed[, our] remand was not ministerial in nature, [and] the trial court’s subsequent actions [are] appealable.” Dissent at 20. We respectfully disagree.

When the trial court chose not to exercise its discretion under *Barberio* to resentence Kilgore on remand “for further proceedings,” our remand became ministerial in nature: The trial court merely corrected Kilgore’s original judgment and sentence by ordering deletion of his two reversed convictions; the trial court did nothing to alter Kilgore’s 1998 exceptional sentences for his five affirmed convictions. Again, as we have previously noted, there was no resentencing on remand for Kilgore to appeal. Kilgore had already exercised his right to appeal his original judgment and sentence, and he had lost on appeal with respect to his five affirmed convictions, the exceptional sentences for which he had chosen not to challenge.

Applying *Barberio*, we grant the State’s motion to dismiss Kilgore’s appeal.

Hunt, J.

Armstrong, J. (Dissenting) -- I respectfully dissent for the following reasons: (1) the majority addresses the substantive issue raised on appeal and then dismisses the appeal; (2) the majority applies an incorrect legal standard and reaches the wrong result in resolving that issue; and (3) the majority incorrectly interprets the relevant case law in support of its alleged dismissal of this appeal.

Before explaining these points, I find it necessary to address the trial court's attempt to enter its 2005 order, stating that Kilgore's judgment and sentence was final when the Supreme Court issued its mandate in October 2002, nunc pro tunc to November 1, 2002. The majority assumes without deciding that this order was invalid but fails to see how that invalidity affects its rationale.

The invalid nunc pro tunc order is relevant because it introduces the faulty premise on which the majority opinion rests: i.e., that Kilgore's judgment and sentence was final in 2002, well before *Blakely* was filed. In the hope of avoiding similar orders and the confusion they create, I set forth a brief explanation of the applicable law.

The purpose of a nunc pro tunc order is to record some prior act of the court that was actually performed but not then entered into the record. *State v. Nicholson*, 84 Wn. App. 75, 78-79, 925 P.2d 637 (1966). A nunc pro tunc order is not a proper means to remedy omissions. *State v. Rosenbaum*, 56 Wn. App. 407, 411, 784 P.2d 166 (1989); see also *State v. Smissaert*, 103 Wn.2d 636, 641, 694 P.2d 654 (1985) (a retroactive entry is proper to rectify the record as to acts that did occur but not as to acts that should have occurred).

The nunc pro tunc order entered here was issued to remedy an omission; i.e., the fact that Kilgore's judgment and sentence was not amended directly after his appeal was mandated. There was no hearing on November 1, 2002, and the nunc pro tunc order that purports to record an act performed on that date is invalid, at least insofar as its retroactivity is considered. (The second 2005 order, which corrected Kilgore's judgment and sentence, was not entered nunc pro tunc.) Both of the trial court's orders therefore must be evaluated as of their 2005 filing dates, a requirement that defeats the possibility that Kilgore's sentence was final in 2002.

The key in this appeal is whether the trial court erred in holding that it was not bound by *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), when it amended Kilgore's judgment and sentence on October 27, 2005. The majority observes that Kilgore has never challenged any of the exceptional sentence aggravating factors or their applicability, either in his first appeal or on remand. The majority then holds that to argue that *Blakely* applies on remand,

[Kilgore] would have to show either some flaw in the predicate facts underlying his original exceptional sentences or that the previous appellate decisions questioned the validity of his original sentences for his five affirmed convictions. But Kilgore argues neither, and the previous appellate and Supreme court decisions evince none.

Majority at 8 n.8.

In order for previous appellate decisions to have questioned Kilgore's sentences, he would have had to challenge those sentences on appeal or in seeking discretionary review. The majority thus holds that a party may take advantage of a new rule of criminal procedure only if the party has raised an argument related to that rule in an earlier proceeding.¹³ The majority cites no

authority for this proposition, and with good reason. The law in Washington is that a new rule for the conduct of criminal prosecutions applies retroactively “to all cases, state or federal, pending on direct review or not yet final.” *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)); see also *Derman v. United States*, 298 F.3d 34, 39 (1st Cir. 2002) (if conviction is not final when United States Supreme Court announces new rule of criminal procedure, then inferior courts must apply that rule to defendant’s case).

In accord with that rule, this court has stated repeatedly that the key to granting sentencing relief under *Blakely* is whether a case was final when *Blakely* was issued. See *State v. Monroe*, 126 Wn. App. 435, 453 n.3, 109 P.3d 449 (2005) (*Blakely* applies to all cases in which review was not final on June 24, 2004), *overruled on other grounds*, *State v. Clarke*, 156 Wn.2d 880, 134 P.3d 188 (2006); *State v. Brundage*, 126 Wn. App. 55, 64 n.11, 107 P.3d 742 (2005) (same), *review denied*, 157 Wn.2d 1017 (2006); *State v. Van Buren*, 123 Wn. App. 634, 639, 98 P.3d 1235 (2004) (same), *overruled on other grounds*, *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005). There is no need for the defendant to have somehow “triggered” *Blakely* relief by complaining of his exceptional sentence beforehand. The only requirement is that his case was not final as of June 24, 2004. See *In re Pers. Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006) (VanDelft appealed his convictions but not his sentence, but because his convictions

¹³ With regard to taking advantage of *Blakely* in particular, the majority adds that Kilgore must show “some flaw in the predicate facts.” Majority at 8 n.8. But if Kilgore’s case was not final when *Blakely* was filed, his receipt of an exceptional sentence based on facts a judge rather than a jury found entitles him to relief. See *State v. Hughes*, 154 Wn.2d 118, 134, 156, 110 P.3d 192 (2005).

were not final when *Blakely* was filed, he was entitled to relief based on *Blakely*), *cert. denied*, 127 S. Ct. 2876 (2007); *State v. Cubias*, 155 Wn.2d 549, 120 P.3d 929 (2005) (defendant did not challenge exceptional sentence on appeal or in petition for review but was allowed to amend the petition to challenge his sentence after *Blakely* was filed).

Indeed, the Washington Supreme Court expressly rejected the majority's approach in *St. Pierre*. The State argued there that the petitioner's conviction was final as to the issue raised, despite recent case law in his favor, because he had failed to pursue that issue on direct appeal. *St. Pierre*, 118 Wn.2d at 327. In response, the court quoted the definition of finality given in *Griffith v. Kentucky*:

By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.

St. Pierre, 118 Wn.2d at 327 (quoting *Griffith*, 479 U.S. at 321 n.6). The *St. Pierre* court interpreted that language to contemplate the finality of the case as a whole, and it rejected the notion that an issue could become final for the purposes of retroactivity analysis before the case as a whole became final. "A contrary approach would encourage parties to maintain seemingly frivolous claims on appeal in the hope another decision may announce a new rule. Such an approach would result in an inefficient use of judicial resources and distract parties from issues of consequence." *St. Pierre*, 118 Wn.2d at 327. The issue is not whether a party has somehow preserved the right to claim relief under a new rule of law but whether his case was final when that new rule was announced. *See St. Pierre*, 118 Wn.2d at 327; *see also Denman*, 298 F.3d at 42 (because new rule was announced before petitioner's case became final, it "follows inexorably"

that the rule applies to his case).

Accordingly, the question here is whether Kilgore's conviction was final when *Blakely* was issued on June 24, 2004. I have found no Washington cases discussing the effect of a partial reversal and remand on a judgment's finality, particularly where a new rule of criminal procedure is at issue. *But see In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 946, 162 P.3d 413 (2007) (holding that judgment is not final until both the conviction and sentence are final). The State cites a single case holding that the right to appeal is exhausted when the appellate court issues its mandate. *See State v. Hunt*, 76 Wn. App. 625, 629, 886 P.2d 1170 (1995). In *Hunt*, however, the defendant's conviction and sentence were affirmed on appeal, and its brief discussion of finality is of little guidance given the facts here.

More pertinent is the Second Circuit's decision in *Burrell v. United States*, 467 F.3d 160 (2nd Cir. 2006), *cert. denied*, 127 S. Ct. 2031 (2007). Burrell was convicted of conspiring to distribute drugs and organizing a continuing criminal enterprise ("CCE"). In 2000, the district court imposed two concurrent life sentences, based in part on federal sentencing requirements regarding the CCE charge. *Burrell*, 467 F.3d at 161-62. The Second Circuit affirmed the CCE conviction but vacated the conspiracy conviction and remanded for correction of the judgment to reflect that dismissal. The court issued its mandate in 2002, and the Supreme Court denied Burrell's petition for certiorari in 2003. *Burrell*, 467 F.3d at 162.

By order dated March 29, 2005, the district court directed the court clerk to file an amended judgment reflecting the conspiracy claim's dismissal. When Burrell argued that the 2005 order should be corrected in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160

L. Ed. 2d 621 (2005), the district court rejected his argument. *Burrell*, 467 F.3d at 162. (*Booker* held that *Blakely* applied to the federal sentencing guidelines, ultimately rendering them advisory rather than mandatory. *Booker*, 543 U.S. at 245-46.)

Burrell appealed, arguing that *Booker* applied to his case because his judgment was not yet final when it was decided. *Burrell*, 467 F.3d at 162-63. His appeal required the Second Circuit to determine, for the first time, when a criminal judgment becomes final for the purposes of retroactivity of a new constitutional rule when it affirms one conviction and remands for dismissal of another. *Burrell*, 467 F.3d at 164. The court noted that with its mandate, it had directed the district court to undertake a single non-discretionary act: to correct the judgment to reflect the dismissal of the conspiracy conviction. *Burrell*, 467 F.3d at 165-66. The court had affirmed Burrell's sentence because the guidelines mandated a life sentence based on the CCE conviction alone. Because the remand was strictly ministerial, Burrell's conviction became final either when the Supreme Court denied his petition for a writ of certiorari or when his time for filing a certiorari petition expired. *Burrell*, 467 F.3d at 166. Therefore, Burrell's case was final before *Booker* was decided. *Burrell*, 467 F.3d at 167. The court framed its holding regarding finality as follows:

Under our holding today, a criminal judgment is final when we reverse some portion of the judgment and remand to the district court only if we affirm both the adjudication of guilt and the sentence on at least one count, and our remand is for the strictly ministerial task of correcting the judgment to reflect the dismissal of one or more counts, whose dismissal must not have affected the sentence, as indicated by our affirmance. We fail to see how a mandate expressed in such categorical, final terms could be construed to leave matters open for the district court to decide.

Burrell, 467 F.3d at 169.

In so holding, the Second Circuit rejected the Ninth Circuit's analysis in *United States v. Colvin*, 204 F.3d 1221 (9th Cir. 2000). *Colvin* had to determine when a judgment becomes final for purposes of the statute of limitations governing habeas corpus petitions when an appellate court "partially affirms and partially reverses a conviction and remands to the district court with instructions to amend the judgment." *Colvin*, 204 F.3d at 1222. The Ninth Circuit ultimately concluded that if the appellate court reverses any portion of a conviction or sentence and remands to the district court, the judgment is not final until the district court has acted on remand and the time has passed for appealing that action. *Colvin*, 204 F.3d at 1225-26.

The Ninth Circuit subsequently applied *Colvin* to a set of facts more similar to those presented here. See *United States v. LaFromboise*, 427 F.3d 680 (9th Cir. 2005). A jury convicted LaFromboise of five drug convictions and three firearms convictions, and he received a 720-month sentence (360 months for the drug counts and 360 months for the firearms counts). *LaFromboise*, 427 F.3d at 681. On appeal, the Ninth Circuit vacated the firearms convictions and remanded for retrial. The government moved to dismiss the firearms counts, however, and the district court granted the motion in 1997. The district court did not conduct a new sentencing hearing on the affirmed counts or enter an amended judgment in light of the dismissed counts. Thus, when *LaFromboise* was issued, the only judgment of record still provided for the original 720-month sentence and still included convictions on each firearm count. *LaFromboise*, 427 F.3d at 682.

Citing *Colvin* as support, the Ninth Circuit concluded that without an amended judgment, LaFromboise's conviction was not yet final. *LaFromboise*, 427 F.3d at 683. The court noted

that its mandate in the prior appeal clearly contemplated further trial proceedings, and it added that implicit in that mandate was the opportunity for resentencing. *LaFromboise*, 427 F.3d at 684. Although the trial court was bound by then-mandatory sentencing guidelines in its original sentencing decision, *Booker* would apply on resentencing to free the court from those guidelines. *LaFromboise*, 427 F.3d at 685 n.6. That new sentence would then be appealable. *LaFromboise*, 427 F.3d at 685.

The dissenting judge disagreed that an amended judgment was necessary to achieve finality, reading *Colvin* to support the conclusion that finality was achieved when the district court acted on the court's mandate by dismissing the firearms charges:

Colvin's holding hinged on the finality of the proceedings, not on the fact that finality was achieved through an amended judgment. . . . We explained that when we reverse any portion of a conviction or sentence and remand to the district court, the judgment of conviction does not become final until the court has acted on remand and the time has passed for appealing the district court's action.

LaFromboise, 427 F.3d at 687 (citing *Colvin*, 204 F.3d at 1225-26) (Callahan, J., dissenting).

Kilgore's judgment is not final under any interpretation of *Burrell* or *Colvin*. Following our reversal of two of Kilgore's convictions, we remanded for further proceedings. Our remand was necessarily open-ended, since we had no way of predicting whether the State would in fact retry Kilgore on those counts and thus no way of directing how his sentence should be modified. Our remand language is clearly distinguishable from that used in both *Burrell* and *Colvin*. Under *Burrell*, Kilgore's case did not become final when the mandate was filed because our remand was not ministerial in nature, thus rendering the trial court's subsequent actions appealable. Under *Colvin*, Kilgore's case did not become final when the mandate was filed because our remand

required the trial court to act and Kilgore again was entitled to appeal that action.

The majority notes my reliance on intermediate federal case law for this portion of my dissent. Our Supreme Court cited similar case law, including *LaFromboise*, to support its holding that a judgment is not final until the conviction and sentence are both final. See *Skylstad*, 160 Wn.2d at 952 n.5. In doing so, the court cited with approval the following statement from *Richardson v. Gramley*, 998 F.2d 463, 465 (7th Cir. 1993): “A judgment is not final if the appellate court has remanded the case to the lower court for further proceedings, unless the remand is for a purely ‘ministerial’ purpose, involving no discretion, such as recomputing prejudgment interest according to a set formula.” *Skylstad*, 160 Wn.2d at 952 n.5.

The majority acknowledges that our remand in this case was open-ended and left the trial court with discretion to resentence Kilgore. But, in an astonishing grant of authority, the majority states that our remand became ministerial when the trial court decided not to resentence Kilgore and not to provide him relief under *Blakely*. The majority’s analysis alters the law governing the finality of decisions and the applicability of new rules of criminal procedure by giving the trial courts of this state the power to determine whether a defendant may take advantage of a decision rendered by the United States Supreme Court. Were it not for the fact that the majority’s entire discussion of this issue is dictum, this would be an alarming development indeed.

The characterization of our remand order depends on our language in the context of our decision, not on what the trial court does in response to our language, particularly where, as here, the trial court attempted to foreclose Kilgore’s *Blakely* rights with a nunc pro tunc order entered after *Blakely* purporting to rule that Kilgore’s case was final before *Blakely*. The majority

concedes that the trial court had the *power* to re-sentence Kilgore, and if it had the power, our remand order can not be construed as ministerial. The trial court's exercise of discretion in not altering Kilgore's sentence simply demonstrates again that Kilgore's case was not yet final. Because it was not final when *Blakely* was filed, Kilgore is entitled to relief thereunder.

Necessary to this holding is the conclusion, contrary to the majority's, that Kilgore's appeal is properly before us.¹⁴ Having disposed of the essential issue in the case, the majority then dismisses the appeal. The majority does so after citing but not heeding the language from Division One's opinion in *State v. Barberio*, 66 Wn. App. 902, 903, 833 P.2d 459 (1992), *aff'd*, 121 Wn.2d 48, 846 P.2d 519 (1993): "We grant the State's motion [to dismiss the second appeal] as to those issues which could have been raised in the first appeal, and deny the motion as to those issues which could not have been raised at that time." (Emphasis added.) Barberio had appealed his convictions but not his exceptional sentences in his first appeal. After Division One reversed one conviction and the trial court imposed the same sentence on the remaining conviction on remand, the defendant appealed again. During that second appeal, Division One considered whether the trial court should have reduced the exceptional sentence in proportion to the reduced offender score and standard range. *Barberio*, 66 Wn. App. at 905.

Somewhat similar circumstances are presented here. On Kilgore's first appeal, he challenged his convictions but not his exceptional sentences. This court reversed some of his convictions, and the trial court eventually imposed the same exceptional sentences on his

¹⁴ The majority dismisses Kilgore's appeal as untimely as well as improper. Kilgore filed his notice of appeal within 30 days of the trial court's October 27 orders, in compliance with RAP 5.2(a). I do not see how his appeal could have been more timely.

No. 34053-4-II

remaining convictions despite the reduction in his offender scores and, more significantly, despite the issuance of *Blakely*. Kilgore could not have anticipated the trial court's 2005 ruling in his first appeal, and he is entitled to challenge it now.

Armstrong, J.

Penoyar, J. — I concur in the result. The important distinction here is between Kilgore's case as a whole as against his individual convictions and sentences. Five of Kilgore's convictions occurred, and their sentences were imposed, in 2002. In 2005, the trial court had the opportunity to revisit these sentences but chose not to do so. Nothing in this court's order required any action by the trial court regarding those sentences. Had the trial court chosen to reconsider the sentences, *Blakely v. Washington*, 542 U.S. 296; 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004), would have limited the facts that the trial court could have considered. This never happened. Therefore, the sentences from 2002 remain in effect.

Penoyar, J.